5256

Residential
Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case References: **LON/00BK/LBC/2009/0047**
& LON/00BK/LDC/2009/0048

DETERMINATIONS OF LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTION 168(4) OF COMMONHOLD AND LEASEHOLD REFORM ACT 2002 AND SECTION 20ZA OF THE LANDLORD AND TENANT ACT 1985

Premises	**25 Upper Montague Street, London W1H 1SA**	
Applicant	Oyama Property Holdings Limited	[*Landlord*]
Respondent	Mrs Eva Barry	[*Tenant*]
Hearing	8 July 2010	
Representatives	Mr William Judge, Director	[*for Applicant*]
	Mr D Dover of Counsel with Ms Chiara Kantor of Housing & Property Law Partnership Solicitors	[*for Respondent*]
	Mrs Barry attended in person	
Tribunal	Prof. J T Farrand QC LLD FCIArb Solicitor	[*Chairman*]
	Mr F L Coffey FRICS	

Background

1. This Determination had to be considered in the light of previous LVT proceedings between the parties and relating to the Premises.

2. The Premises have not been inspected by the Tribunal but were understood to comprise one large house in a Georgian terrace, which has been divided into three flats: Flat 1 is in the basement plus one front ground floor room and one of two under-pavement cellars, Flat 2 consists of the first floor plus the rest of the ground floor and Flat 3 has the third and fourth floors.

3. The Applicant Company was registered as freehold proprietor on 31 July 2001 by virtue, it was understood, of a collective enfranchisement. The Tribunal was told that Mr Judge and his wife were the only members and officers of this Company. A copy of the register of title as at 29 May 2003 seen by the Tribunal included a Schedule of Notices of Leases of the three flats, each for a term of 125 years from 1994. Again the Tribunal was told that Mr Judge was the lessee of Flat 3 and his wife of Flat 2, but these leases and their registered titles have not been seen by the Tribunal.

4. Mrs Barry was registered as the leasehold proprietor of Flat 1 on 25 October 1999. She holds under a lease, a copy of which has been seen by the Tribunal, originally granted in 1994 for a term of 125 years in consideration of a premium and ground rent rising from £150 to £2,400. The lease contains usual covenants, including provision for service charge payments of 30% of costs incurred. The demise defines Flat 1 by reference to a plan and includes rights over "the Building Common Parts" defined (clause 1(iv)) as meaning:

   > "such of the entrances landings entryphone systems communal television aerials of the Building the left hand cellar on lower ground floor thereof and the utility room on the ground floor thereof all of which are intended to be enjoyed or used in common by the owners and lessees of any flats in the Building".

   Evidently, Mrs Barry did not participate in the 2001 enfranchisement whereby the Applicant Company acquired the freehold.

5. Following Applications made by Mrs Barry in 2007, a differently constituted Tribunal made Determinations, dated 14 May 2008, not only under s27A of the 1985 Act restricting her alleged service charge liability but also under s.24 of the Landlord and Tenant Act 1987 appointing a manager [LON/00BK/LAM/2007/0018]. At that Hearing both parties were represented by Counsel and Mr Judge gave oral evidence. Mrs Barry also applied for and obtained an order under s.20C precluding the recovery of the Landlord's costs as a service charge and a direction that her fees should be reimbursed.

6. The Appointment of a Manager was made on the basis that the Landlord Company had admittedly been in breach of its obligations under Mrs Barry's lease, in particular by failing to insure the Premises, and because that Tribunal found such an appointment to be "just and convenient in all the circumstances of the case" (para.29). This decision implicitly accepted submissions criticising Mr Judge as "clearly incapable of managing the property" (para.27).

7. The consequent Order for the Appointment of a Manager, also dated 14 May 2008, began generally (para.1; italics supplied for emphasis):

"Phil Day of Tide End Management Limited is hereby appointed as the manager and receiver of 25 Upper Montagu Street, London W1H 1 RQ ("the Premises") pursuant to s 24 of the Landlord and Tenant Act 1987 ("the Act") *and is given for the duration of his appointment all such powers and rights as may be necessary and convenient and in accordance with the Lessees' Leases of the Premises ("the Leases") to carry out the management functions* of [Oyama Property Holdings Limited]"

8. The Order then particularized various rights, powers and duties, including the following of present significance (sub-para.(e):

> "The power in his own name or on behalf of [Oyama Property Holdings Limited] to bring, defend or continue any legal action or other legal proceedings in connection with the Leases or Premises including but not limited to proceedings against any Leaseholder in respect of arrears of rent, service charge or other monies due under the Leases and to make any arrangement or compromise on behalf of the Respondent save that the Manager shall not have the right to continue any such legal action or other legal proceedings or to make any arrangement or compromise on behalf of the Respondent in relation thereto as shall have been commenced before the date of his appointment apart from any proceedings against any Leaseholders in respect of arrears of rent, service charge or other monies due under the Leases."

9. Neither the Determination nor the Order specified the period of Mr Day's appointment. Nevertheless, the Order did expressly state (para.10) that the Manager, as well as the parties, had liberty to apply to the Tribunal for directions under s.24(4) of the 1987 Act. Section 24(9) of that Act also provides that the Tribunal might, on the application "of any person interested" vary or discharge an order made under the section. This is subject to certain restrictions in s.24(9A), which would have applied had such an application been made by Oyama Property Holdings Limited or by Mr Judge. Legally, therefore, without a variation or discharge by the Tribunal, Mr Day would remain appointed as Manager.

10. However, Mr Day wrote letters, dated 30 March 2009, to each of Mrs Barry and Mr Judge, informing them of his resignation from the appointment as Manager. Because of Mr Day's purported resignation, Mrs Barry applied to the Tribunal for a variation of the Order by the substitution of a different Manager. A Hearing was arranged for this Application on 5 November 2009. At the outset, the Tribunal was informed that the person nominated as a substitute had been agreed to by Mr Judge. Accordingly, after hearing oral evidence from the nominated person as to his qualifications and experience, the Tribunal determined that the Order should be varied by deleting (in para.1) "Phil Day of Tide End Management Limited is herby appointed" and substituting "Aaron Landeryou of Drivers & Norris Property Management is hereby appointed with effect from 5 November 2009 for an initial period of two years".

11. Despite the fact that the Order appointing a Manager had not been varied or discharged, two Applications were made to the Tribunal by the Applicant

Company in June 2009. One sought a determination that a breach of covenant had occurred because of alterations to the Respondent's flat made without prior consent. The other sought a dispensation from the statutory consultation requirement in respect of urgent roof works.

12. A Pre-Trial Review of these Applications had been arranged so as to follow the Hearing of Mrs Barry's Application to vary the Order appointing a Manager. However, the parties again had constructive discussions. As a result, Ms Kantor representing Mrs Barry requested, in effect, a consent order as to agreed Directions in accordance with a draft which she submitted. This was confirmed by Mr Judge.

13. On the basis that the agreed directions were designed to enable the parties to clarify the facts and issues sufficiently for them to settle the two cases by agreement and without any determinations, the Tribunal was content to adopt, with minor amendments, the agreed directions. Accordingly, the two Applications were stayed until 1 March 2010 and various procedural matters directed.

14. Notwithstanding the lengthy postponement proposed by the parties with a view to settlement, Mr Judge wrote to the Tribunal's Clerk, dated 1 March 2010, to inform the Tribunal that no agreement had been reached in either case. The lack of agreement was attributed to obstruction by Mrs Barry and her representatives plus collusion with the appointed Manager in terms which were understandably found offensive. The only appropriate response from the Tribunal was to arrange a Hearing date.

Abuse of Process

15. An unfortunate consequence of directions based on consent with a view to settlement being made at the Pre Trial Review was that no consideration was given to the legitimacy of the two Applications. By virtue of the Order for the Appointment of a Manager made by a Tribunal on 14 May 2008, all management functions in relation to the Premises and to all the Leases had become vested in Mr Day in accordance with the statutory scheme enacted by Part II ss.21-24 of the 1987 Act as amended. They are now vested in Mr Landeryou. It cannot be doubted that the enforcement of covenants and the repair of roofs are management functions. True the 1987 Act does not expressly provide that the appointment of a manager under the statutory scheme divests a landlord and any manager previously acting of all their management functions, but this must be a matter of necessary implication subject to the terms of the Order providing otherwise.

16. When asked by the Tribunal at the Hearing about his standing to make the Applications, Mr Judge's reply was threefold. First, he said that Mr Day was not doing anything so that he felt obliged to act to protect the Premises. Second, he stated a belief that that these were legal proceedings which had commenced before the appointment of a Manager and therefore excepted from the Manager's functions (see para.8 above). And third, he claimed to have been advised to make the Applications by Tribunal staff.

17. The Tribunal did not regard this reply as acceptable. First, Mr Judge should certainly have known that the proper response to Mr Day's inactivity was to apply to the Tribunal for directions, if not for a variation or discharge of the

Order appointing him. Second, not even an unintelligent layman would actually have thought that legal proceedings had commenced before the two Applications were made and Mr Judge is not unintelligent. And third, Tribunal staff give information not advice and it was thought significant that Mr Judge was unable to produce anything in writing to support his claim – not even a letter from himself seeking such advice never mind a letter in reply giving it.

18. Accordingly, it appeared plain to the Tribunal that both Applications could have been dismissed as an abuse of process under reg.11 of the LVT (Procedure) (England) Regulations 2003. However, no application for dismissal was made by Mr Dover for Mrs Barry. Instead, he relied on abuse of process when applying for costs under para.10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002. Further, had the Tribunal been minded to dismiss the Applications, the Regulations provided for 21 days notice to be given before doing so.

19. Consequently, the Applications were not simply dismissed and were considered consecutively.

Breach of Covenants

20. The descriptive sub-heading for s.168 of the 2002 Act is: "*No forfeiture notice before determination of breach*". The section apples to dwellings and subs.(4) provides:

> "A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

21. The present Application to the Tribunal contended that Mrs Barry was in continuing breach of clause 3(8) of her lease, whereby she covenanted:

> "Not without the previous consent in writing of the Lessor such consent not to be unreasonably withheld to make any alterations structural or otherwise to the Property or cut maim or injure any of the walls or timbers thereof nor alter the internal arrangement thereof and not to commit or allow any waste or spoil on or about the Property".

22. Certain specific allegations in support of this contention could be extracted with dates and difficulty from the verbiage and identified as follows:

i.	Disconnection of electricity supply	1999
ii.	Structural and other alterations to Flat 1	1999
iii.	Construction of sewer inspection chamber	1999
iv.	Fixing holes through main entrance step	1999
v.	Fitting security bars to basement windows	1999
vi.	Reconstruction of basement entrance lobby	2005
vii.	Cable conduit through common parts cellar	2006

23. The Respondent's Statement of Case, dated 11 April 2010, dealt with these allegations as follows:

Clause 3 (8) - Works carried out in 1999-2000

1. When the Respondent purchased the Flat in 1999 after being re-possessed from its former owner(s), it was uninhabitable due to its poor condition. This included missing floorboards in the basement and no electricity connections being in place. The staircase was broken and too short because the base of the spiral staircase ended at platform and not at ground level. As a result, these platforms were collapsing due to their state of disrepair. The Respondent's mortgagee required work to be undertaken and withheld payment of the full mortgage until necessary works were completed, demonstrating the poor condition of the Flat.

2. By a Licence for Alterations dated 5 April 2001, the Applicant's predecessor in title, Messrs Margolin granted the Respondent permission to carry out works to Flat 1, 25 Upper Montague Street, London, W1H (`the Flat').

3. The said works included:

   a. The removal of the spiral staircase, which had only been in situ for around 20 years and was too short, having to be propped up on a chipboard slab and which was falling apart;

   b. The addition of a new internal staircase in place of the spiral stair case;

   c. The moving of the kitchen from the ground floor to the lower ground floor;

   d. The removal of internal partition walls;

   e. The construction of new partition walls;

   f. The construction of a balustrade;

   g. The addition of metal bars for security purposes at the entrance;

   h. Any ancillary works necessary to effect the above alterations.

4. Pursuant to the said licence the Respondent paid Messrs Margolin, £1,000.

5. The Applicant did not become the freeholder of 25 Upper Montagu Street, London, W1 H (`the Building') until about July 2001.

Clause 3 (8) Drainage and Sewage works

6 It is denied that the Respondent is in breach of clause 3 (8) in respect of works carried out to the drainage and sewage at the Flat. All that the Applicant has done was to open up a pre existing hatch in order to enable the drainage system to be cleaned and rodded more effectively on the first occasion it became apparent that a previous owner tiled over the drain hatch. The opening up simply involved taking up a few tiles in the lobby. The hatch is now under some tiles which can be removed if access is necessary. Such access is necessary approximately every two years.

Clause 3 (8) Electrics

7. It is denied that the Respondent has altered the electricity supply so as to deprive the communal area of electricity. During the course of the building works in 2000, Mr Judge, the owner of flat 3 in the Building

requested the Respondent's electrician to relocate the electric meters to the common parts. Any moving of the electricity supply was at the request of Mr Judge and was not carried out by the Respondent.

8. Further, to the extent that the matters complained of fall outside the Flat, it is denied that any alteration of the electricity supply could amount to a breach of clause 3 (8).

Clause 3 (8) works to Lobby in 2005

9. Since at least 1999, water had leaked into the lobby from the main step leading to the Building. Despite numerous complaints by the Respondent and attempts by the freeholder to repair. To date however, a full repair was prevented by the Applicant.

10. In 2005, because of water ingress from above, the lobby to the Flat collapsed. The Applicant was aware of this and agreed with the Respondent that it would have to be re built.

11. In the premises, the Applicant waived the right to complain of a breach of clause 3 (8) in respect of the construction of a new lobby in 2005.

Clause 3 (8) — damage to cellar vault — May 2006

12. The alleged damage was carried out by third parties and not the Respondent and so any damage is their responsibility.

13. Further or alternatively, it is denied that this amounts to a breach of clause 3 (8) in that the alleged damage occurred to an area outside of the Flat.

14. Further, the Applicant is put to proof of the said damage.

Clause 3 (8) Drilling into tiled main entrance steps / damage to facings of external basement steps / damage to cast iron railings / blockage of service pipe duct.

15. It is denied that the Respondent is responsible for any damage to the steps or railings.

16. In any event, it is denied that these items fall within the demise and therefore denied that any damage caused to them could amount to a breach of clause 3 (8).

24. Apparently undaunted by the strength and substance of Mrs Barry's response, Mr Judge submitted the following (dated 14 June 2010):

Addendum to the original Application filed in June 2009 in response to the Respondent's Statement of Case.

1. Structural alterations and works conducted 1999:

In the light of the Respondent's recent disclosure of a retrospective "Licence for Alterations" purportedly issued by Messrs Margolin the Applicant's predecessor(s) in title on the 5 April 2001, the Applicant wishes to draw the Tribunal's attention to the fact that it was hitherto unable to refer to the covenants terms and provisions that were clearly conditional to the granting of that licence.

The Applicant would therefore request the Tribunal to determine all matters pertaining to the Respondent's breaches of the lease, arising in 1999 until the date of issuance of that licence, on the basis that the Respondent has since failed to honour the specific terms and conditions of that retrospective "Licence for

Alterations" and furthermore that by her non performance of those obligations the Respondent has remained in continuing breach of the covenants she entered into as were conditional to the said licence agreement particularly with specific reference to clauses 5.1, 5.2 and 5.6 .

2. Unauthorised works conducted since July 2001:

In all other matters relating to the Respondent's series of unauthorised works conducted since July 2001 the Applicant would request the Tribunal for a determination to be made simply on the basis of the Respondent's habitual failure to comply with the terms of her lease, specifically clause 3(8) and clause 3(7).

25. So, faced with the rebuttal of his primary complaints concerning the 1999 alterations, Mr Judge did not, as a reasonable person might have, reconsider and retract. Instead, he referred to the Licence as "purportedly issued", thus insinuating a fraud without justification, but asked the Tribunal to treat it as "clearly conditional" and rescinded for breach of condition. However, the Licence for Alterations is clearly not conditional: it does contain standard form covenants, incorporated into Mrs Barry's lease, but Mr Judge was, in any case, unable to substantiate his assertions that these had been breached.

26. In addition, Mr Judge ignored the submissions, made on behalf of Mrs Barry, that the 1999 works relating to the electricity supply, the sewage inspection chamber and the main entrance step could not constitute breaches of clause 3(8). In the opinion of the Tribunal, these submissions were so obviously right that a reasonable person would have conceded that the relevant complaints were misconceived.

27. At the Hearing, the Tribunal asked Mr Judge about the point of seeking a declaration that there had been breaches of covenant in 1999, when forfeiture of Mrs Barry's lease had plainly been waived through acceptance of rent by the then freeholders as well as by the current freeholder, the Applicant Company. He readily recognised that forfeiture would not be an available remedy. As to the point of the proceedings, in a "Written submission and concluding summary", dated 7 July 2010, after repeating the allegations as to breaches, he had stated:

> "Therefore the Applicant feels that it would be only right and proper for the Tribunal to determine that the seriousness of the continuing fire and structural risks posed to the building and all of its occupants must be remedied - and as the undeniable cause of those perils, the Respondent should be obligated to carry out such repairs as are thought necessary to comply with WCC's Building Control and fire safety regulations, failing which the Respondent shall remain in continuing breach of the terms of the Lease until those remedial obligations are satisfied."

Then he concluded his summary by stating:

> "The Respondent should provide funds to cover the cost of the remedial works which will [be] completed within a reasonable time scale to be set by the Applicant, or the Tribunal or the Court."

28. As to the so-called "Unauthorised works conducted since July 2001", Mr Judge appeared to ignore the self-evidently correct submission that the

works relating to the cable conduit through common parts cellar in 2006 could not be breach of clause 3(8). Instead, he asked the Tribunal for a determination "made simply on the basis of the Respondent's habitual failure to comply with the terms of her lease, specifically clause 3(8) and clause 3(7)".

29. This was Mr Judge's first complaint of a breach of clause 3(7) of Mrs Barry's lease. That sub-contains a lessee's covenant:

> "Not to do or permit or suffer to be done anything whereby the insurance on the Building or any part thereof may become void or voidable"

Since the principal default on the part of the Applicant Company leading to the Appointment of a Manager had been an admitted failure to insure the Premises, the Tribunal had difficulty in taking this complaint seriously. However, as with other complaints, Mr Judge never produced any evidence to substantiate his complaint.

30. At the Hearing, a conflict between the parties emerged with regard to the basement lobby works in 2005. In particular, Mr Judge disputed Mrs Barry's statement that:

> "In 2005, because of water ingress from above, the lobby to the Flat collapsed. The Applicant was aware of this and agreed with the Respondent that it would have to be re built.

On the basis of the alleged agreement, a submission had been made for Mrs Barry that the right to complain about a breach had been waived.

31. Consequently, Mrs Barry gave oral evidence that she and her sub-tenant had met Mr Judge on the pavement outside the Premises sometime in 2005. She said that Mr Judge had orally agreed to 'like for like' reconstruction of the lobby in the interests of security and that he did not ask for plans, appearing happy that she would be paying for the works. She added that, since Mr Judge had changed the front door locks in 2002, the only access to and from Flat 1 had been via the basement area lobby entrance.

32. In contrast, Mr Judge flatly denied that there had been any such meeting or other contact concerning the lobby. However, he acknowledged that it had been obvious from the pavement that the lobby needed repairs but claimed that it had not actually collapsed. He stated that the works undertaken for Mrs Barry took 2½ weeks. In addition, he stated that front door keys had been offered to Mrs Barry, to be cut to order at current cost (£16 each), but she had not paid her 30% contribution to the cost of fitting the new locks (total £774.99).

33. The Tribunal found it unnecessary to resolve this direct and difficult conflict of evidence. The effective reason is that the information available in the form of documents, drawings and pictures was sufficient to satisfy the Tribunal that the works of repair and reconstruction undertaken to the lobby did not constitute alterations within the meaning of clause 3(8) of Mrs Barry's lease. Therefore, no breach of covenant was committed by her in not obtaining the previous written consent of the Applicant Company.

34. Although the works to the lobby may not have been "non structural interior" repairs within the lessee's repairing covenant in clause 4(1) of Mrs Barry's lease, this does not mean that she was in breach of any covenant. Conversely, however, it appears quite clear to the Tribunal that the Applicant Company was in breach of its own covenant to maintain in good repair and condition the structure and exterior of the Premises (see clause 5(4) and para.7 of the Fourth Schedule to Mrs Barry's lease). Section 168(4) of the 2002 Act only provides for "a determination that a breach of covenant or condition in the lease has occurred" without expressly restricting this to breaches by tenants. An application to a Tribunal for such a declaration may only be made by a landlord under a long lease but it seems that the resulting declaration could be against an applicant landlord in an appropriate case.

35. Nevertheless, in the present case, for the reasons adequately indicated in the preceding paragraphs, the Tribunal has only decided *not* to make a declaration that Mrs Barry has committed any breach of any covenant or condition in her lease.

Dispensation re Consultation

36. The second Application, dated 24 June 2009, was made by the Applicant Company under s.20ZA of the 1985 Act for the Tribunal to dispense with the consultation requirements provided for by s.20 of that Act in relation to so described "emergency works required to remedy roof leaks".

37. In the Application, the works were described as "imminent". In fact, it appears that Mr Judge had already asked for an estimate from D.R.S. Roofing which was received on 25 June 2009, in the sum of £2,030. An Order was placed by Mr Judge by letter dated 26 June 2009, seeking confirmation of "your earliest start date". The works were quickly completed, a receipted Invoice from D.R.S. Roofing showing payment of the quoted sum on 7 July 2009. That Invoice also showed what the Emergency Roof Repairs consisted of:

> Supply and install new lead gullys to hip ends of roof.
> Felt, batten and re-tile hip end.
> Install new lead flashings to hip ends.

38. Mr Judge submitted an Applicant's Statement of Case, dated 10 March 2010, which began:

> "The Applicant's need to seek dispensation under the provisions of Section 20 of The Landlord and Tenant Act 1985 arose entirely because the LVT's "Manager" Mr. Phil Day, appointed in May 2008 under Section 24 of The Landlord and Tenant Act 1987, had failed to attend to the urgently needed roof repairs."

However, with exceptional honesty, he also included a Summarised History, which began earlier:

> "In 2002 the Applicant, as part of its management obligations, had initiated regular surveys of the building and was producing schedules of repairing priorities which commenced with intended repairs to the roof."

Apparently, no such repairs were actually undertaken until July 2009.

39. The Respondent's Statement of Case as to the s.20ZA Application was as follows:

> *Appointment of a manager*
>
> 23. At all material times, by reason of the order of the Leasehold Valuation Tribunal dated 14th May 2008 appointing a manager in respect of the Building, the Applicant had no right to carry out works to the roof. Alternatively, the Applicant has no right to claim any contribution by way of service charge for any works it has voluntary carried out to the Building.
>
> *No consultation*
>
> 24. If, which is denied, the Applicant is entitled to claim a service charge contribution in respect of the said works, then it is denied that the consultation requirements should be dispensed with.
>
> 25. The Applicant carried out the works without any warning or consultation to the Respondent. Even if, which is not admitted, there was urgency in respect of the roof works, the Applicant could still have tried to comply with parts of the consultation requirements in that it could have:
>
> a. Informed the Respondent prior to the works commencing of its intended contractor, of the nature of the works and the price;
>
> b. Sought alternative quotes for the work;
>
> c. Sought comments and/or suggestions for alternative contractors from the Respondent.
>
> 26. Had the Applicant consulted with the Respondent, the Respondent would have wanted to ensure that only the essential emergency works were undertaken at the best price obtainable with a reputable contractor and that at least three quotes were obtained before commencing work.

40. At the Hearing, Mr Judge did not attempt to answer the submissions made for Mrs Barry, but simply submitted that "someone had had to act".

41. The statutory provisions as to dispensation are ss.20(1) and 20ZA(1) of the Landlord and Tenant Act 1985, as follows:

> "20(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either –
> (a) complied with in relation to the works or agreement, or
> (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal."
>
> "20ZA(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements."

42. These provisions conferring jurisdiction on this Tribunal were inserted by the Commonhold and Leasehold Reform Act 2002 (s.151). Before the 2002 Act amendments there was a two-stage process under which the discretion to

dispense with the consultation requirements arose only if a Court was satisfied that the landlord had acted reasonably. In consequence of this change, it was decided by a Lands Tribunal (member Andrew J. Trott FRICS) that the conduct of the landlord should, in effect, be disregarded and that, in deciding whether dispensation would be reasonable: "The most important consideration is likely to be the degree of prejudice that there would be to the tenants in terms of their ability to respond to the consultation if the requirements were not met" (*Eltham Properties Ltd v Kenny* 2007 [LRX/161/2006] at para.26).

43. The prejudice test thus introduced and applied almost as if a statutory criterion in other Lands Tribunal cases was reconsidered but confirmed by the Senior President of the Lands Tribunal (Lord Justice Carnwarh sitting with Mr N J Rose FRICS) in *Daejan Invesments Ltd v Benson & Others* [2009] UKUT 233. However, there is an important point to be borne in mind: in applying the prejudice test, the burden of proof appears to be on the landlord. In the *Daejan* decision, it was stated in the final paragraph (para.62 brackets supplied) that:

> "As to prejudice, the tribunal was entitled to start from the position that, given the seriousness of the breach, it was not for the lessees to prove specific [lack of] prejudice. It was enough that there was a realistic possibility that further representations might have influenced the decision."

In context, this statement plainly makes sense only if the bracketed words – "lack of" – are deleted.

44. The Tribunal considered that, in the light of the Lands Tribunal's guidance, the reasonableness or otherwise of Mr Judge's conduct was not the decisive factor and prejudice did not depend on the actual consequences. The most important consideration was the degree of prejudice to Mrs Barry in terms of her inability to respond to and act upon a consultation about the proposed emergency roof works and, in particular, about the single estimate and the chosen contractor.

45. The Tribunal is satisfied that, in all the circumstances of this case, it would not be reasonable to dispense with the statutory consultation requirements. Since no dispensation has been determined by the Tribunal, Mrs Barry's individual contribution to the costs of the so-called emergency roof works is 'capped' at £250 (see s.20(3) of the 1985 Act, as amended, and reg.6 of the Service Charges (Consultation Requirements) (England) Regulations 2003).

46. Whether or not Mrs Barry is liable to make any contribution to the costs of the works, particularly in the light of the submission that the Applicant Company was entitled neither to carry out the works nor to claim a contribution from her, was a matter outside the scope of the Application being considered. Therefore, no determination as to that wider matter is made but only a determination not to dispense with the statutory consultation requirements.

Costs

47. At the close of the Hearing, Mr Devon drew attention to the power conferred on the Tribunal by para.10 of Schedule 12 to the Commonhold and Leasehold Reform 2002:

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

48. Mr Devon sought a determination by the Tribunal that costs were payable to Mrs Barry by the Applicant Company under this para.10 power. Primarily, he relied on the factors already outlined adequately in para.s 15-16 above as to Abuse of Process. He submitted that the two Applications, even though not dismissed as an abuse of process, should be regarded as having been made unreasonably within the meaning of para.10(2)(b).

49. Mr Devon further submitted that the two Applications had been made by Mr Judge on behalf of the Applicant Company not for any good reason but vexatiously. In his submission, they had been made, in effect, by way of retaliation against Mrs Barry for challenging his control of the Premises by making her initial successful Applications in 2007.

50. In addition, Mr Devon submitted that the terms of Mr Judge's correspondence in connection with the proceedings not only indicated that he was conducting a personal vendetta against Mrs Barry as well as against the professional people involved but also amounted, literally, to acting abusively. He referred the Tribunal to illustrative extracts in various letters Mr Judge had written for the Applicant Company -

30 April 2010 to Ms Marsh Lawrence, Deputy Regional Manager of Panel:

Headed "**Abuse of Tribunal Procedural Directions**"

30 April 2010 to the Tribunal Chairman:

"I have been compelled to write to you on behalf of the Applicant in these proceedings because it is evident to me that the Respondent's solicitor and the "manager" appointed by the LVT's have colluded in an attempt to seize conduct of essential preliminaries designated for the S168 hearing - Please allow me to explain."

"However, the differences between the parties in this matter have escalated due primarily to Ms. Kantor's conduct where she appears to have acted in defiance of the Tribunal's Directions as were set down by yourself in November 2009."

"I believe Ms. Kantor's approach to such an important matter was contentious and exposed an unethical bias right from the very beginning of the stay."

"Clearly, Ms. Kantor's action was not what the Tribunal had intended. Her decision appears to represent an abuse of procedure, if not professional conduct. It was contrary to the Tribunal's Directions - and certainly not what was agreed between the parties.

And furthermore, given that Mr. Landeryou was evidently party to this arrangement and the fact he was fully aware of the Tribunal's Directions at that time, it would appear to suggest complicity whilst revealing a general lack of professionalism in not exercising better judgement, and in particular, by not reverting to the LVT for proper guidance.

There is no doubt in my mind that both Ms. Kantor and Mr. Landeryou should be called to account for their dubious conduct and actions in handling this sensitive matter."

"The matter was further complicated due to evidence which suggests that Ms. Kantor and Mr. Landeryou have colluded to pervert the 'management' procedures as were ordered by the Tribunal in November 2009."

"Mr. Landeryou's conduct towards me is symptomatic of contempt and arrogance, it has destroyed my trust in him, my hopes and any confidence that may have existed in our ability to work in harmony for the future common good of the property and its residents."

"I believe Ms.Kantor should be called to account for her actions which I feel were not befitting of her status as a member of the legal profession."

1 July 2010 to Ms Kantor of HPLP Solicitors:

"Clearly your client's statement of truth as submitted to the Tribunal [p.5. 19 i. and 22] is not true. It is tantamount to perjury. That document was no doubt produced by you as Mrs. Barry's solicitor as such it would appear to represent a perpetuation of an untruth."

7 July 2010 addressed to Ms Kim Harry, the Tribunal's Clerk:

"The Respondent is a "Buy-to-Let" property investor who does not live in the property.

The Applicant was represented by Mr. W Judge as an officer of that company and also as, one of the Lessees living within the Building.

In the absence of any sign of the Respondent's willingness to address these matters, the Applicant's mission was to try and mitigate the

prevailing risks to the Building and protect the freehold and leasehold interests of all concerned.

At the pre-trial review in November 2009 it was agreed - indeed, Directed by the Tribunal, that both parties would make an attempt to negotiate an agreed way forward.

However, the Respondent and Ms. Kantor her solicitor both made it clear that putting right either of the very serious core safety issues is not open for discussion and that they were intent upon fighting and obstructing every move that I make to address them."

51. Mr Dover submitted that, despite the absence of vulgar language, Mr Judge's style of correspondence following his Applications had been consistently abusive.

52. Mr Judge offered no answer to these submissions but, instead, asked the Tribunal to require Mrs Barry to reimburse the fees paid by him in respect of the proceedings. His first ground for asking this was that Mrs Barry should have disclosed to him earlier the Licence for Alterations granted to her in 2001 by his predecessors. Had she done so, he submitted, there would have been no Application under s.168(4) of the 2002 Act. His second ground was that Mrs Barry had not been cooperative as to roof repairs: had she been, there would have been no need for the Application under s.20ZA of the 1985 Act.

53. The Tribunal rejected Mr Judge's grounds for asking for a reimbursement of his fees. Had he withdrawn the s.168(4) Application when the Licence was disclosed to him, thus saving the Hearing fee, the Tribunal might have thought differently, but he did not. In any case,, Mrs Barry and her representative might reasonably have supposed that the Licence for Alterations had been disclosed to him or his solicitors on acquisition of the freehold of the Premises. Also, Mrs Barry could not reasonably have been expected, in all the circumstances including particularly the appointment of a Manager, to waive her statutory entitlement to be consulted about major works.

54. Otherwise, the Tribunal fully accepted Mr Devon's submissions as to costs. The Tribunal had formed an unavoidably adverse impression of Mr Judge's motives for commencing and continuing the proceedings concerning his two misconceived Applications: it all had the feel of an small landlord's exercise in tenant harassment.

55. Accordingly, the Tribunal has decided to determine that the Applicant Company shall forthwith pay the sum of £1,000 to Mrs Barry towards her costs incurred in connection with the proceedings occasioned by the two Applications considered by the Tribunal (ie £500 re each Application). In the general knowledge of legal costs possessed by the Tribunal, it seems certain that Mrs Barry will, unfortunately, still be out of pocket after receipt of these capped sums.

Chairman **30 July 2010**